NO. 21630

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT JAMES LINGO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTION AND STATEMENT OF THE CASE

The Federal Grand Jury for the Southern District of California returned Indictment No. 4303-ND on July 13, 1966, charging appellant with violating the Universal Military Training and Service Act, Title 50, App., Section 462, United States Code. On September 6, 1966, appellant pleaded not guilty. On December 6, 1966, he was found guilty by a jury in a trial before the Honorable Myron D. Crocker. On January 3, 1966, appellant was sentenced to the custody of the Attorney General for three years and thereafter he filed a timely notice of appeal.

The District Court had jurisdiction to try the case under

Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTORY PROVISIONS INVOLVED

Title 50, Appendix, Section 462, United States Code, provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

Title 50, Appendix, Section 456(j), United States Code provides in part:

> " . . . nothing contained in this title [section 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

III

STATEMENT OF FACTS

On December 28, 1959, appellant registered at Local Board No. 63, located at 660 17th Street, Merced, California [Ex. 1, pages 1 and 2]. 1/

On October 30, 1962, the Local Board mailed appellant a Classification Questionnaire which he completed and returned to the Board on November 2, 1962. In response to Series VII of the

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1/ Ex. 1 refers to plaintiff's Exhibit 1.

Questionnaire pertaining to a minister or student preparing for the ministry, appellant stated: "I am a student preparing for the ministry pursuing a full-time course of instruction at the Kingdom Hall of Jehovah's Witnesses under the direction of Jehovah's Witnesses." Appellant also signed his name to Series VIII, thereby requesting the Local Board to furnish him a form for Conscientious Objectors [Ex. 1, pp. 4-9].

On November 2, 1962, the Local Board mailed appellant a Selective Service System Form 150, which is a special form for conscientious objectors [pp. 11-12]. On November 8, 1962, the Local Board received from appellant the completed Form 150. On page 1 of this form he indicated his opposition to participation in war either as a combatant or non-combatant. On page 2 of the form appellant explained how, when, and from what source, he received the training and acquired the belief which is the basis of his claim, as follows: "From childhood I was taken by my parents to the Kingdom Hall of Jehovah's Witnesses. There I learned the Bible principles that formed the basis for my belief." On page 3 of the form with respect to the official position of Jehovah's Witnesses concerning participation in war, appellant stated: "One's participation or non-participation in war is left for the individual member to decide." [Ex. 1, pp. 12-15].

On November 14, 1962, the Local Board mailed appellant a request that he appear for a personal interview with the Board on December 13, 1962, for the purpose of clarifying information in his Selective Service file [Ex. 1, p. 16]. On that date appellant

met with members of the Local Board and stated: "I am right now in training for the ministry." He also stated that this involved about four hours on week-ends participating in his church work, consisting of about one hour in a study group on Sunday night and the remainder in door-to-door preaching. Appellant stated that he had not been active in the Witnesses all of his life and that "I only became active about a year ago". He said that reason that he was not active was "I just was not interested". Appellant also stated that he objected to going to work in hospitals because he would be under Government control [Ex. 1, pp. 18-19]. Prior to conclusion of his interview with the Local Board appellant was asked questions designed to disclose his attitude toward the use of force. Thereafter, in response to the Board's question "Do you have anything that you would like to go on record here?". Appellant replied "No, I do not" [Ex. 1, p. 19].

On December 13, 1962, appellant was classified 1-A by the Local Board and was mailed notice of this classification on December 14, 1962 [Ex. 1, p. 8]. On December 19, 1962, the Local Board received a letter from appellant expressing his disagreement with the 1-A classification and requesting papers for an appeal [Ex. 1, p. 22]. Also on December 19, 1962, the Local Board forwarded the file of appellant to the Appeal Board [Ex. 1, pp. 11, 24].

On January 24, 1963, the Appeal Board tentatively determined that appellant should not be classified in Class 1-0 or in a lower class, and referred the matter to the Department of Justice

for the purpose of securing an advisory recommendation [Ex. 1, pp. 11, 25]. On November 4, 1963, the Department of Justice referred the matter to a hearing officer [Ex. 1, p. 31]. On February 25, 1964, the Department of Justice mailed the Appeal Board its recommendation based upon the conclusion of the hearing officer without a personal appearance by appellant [Ex. 1, pp. 33-39]. On March 2, 1964, the Appeal Board mailed appellant a copy of the Department of Justice recommendation and gave appellant 30 days within which to make any reply [Ex. 1, p. 40]. On March 23, 1964, the Board received a two-page written reply from appellant stating in part as follows: "I am aware that my reaching draftable age and becoming a student and adherent of the Bible took place at approximately the same time in my life. However, for you to conclude that the latter was an attempt to obviate the obligations of the former would be in error. Such was only coincidental and it is my wish that I had become more serious about religious matters earlier in my life." [Ex. 1, pp. 41-42].

In order to give appellant a personal appearance, his case was re-opened and on January 18, 1965, he appeared before the Hearing Officer [Ex. 1, p. 51]. Appellant informed the Hearing Officer that he was baptised a Jehovah's Witness on May 3, 1963. The Hearing Officer noted that appellant was inactive in congregational work prior to his 1-A classification by the Local Board and that he did not begin any intensive study of the Bible until about January 1963. Appellant told the Hearing Officer that it was a mere coincidence that his study of the Bible began after his 1-A

classification on December 13, 1962. The Hearing Officer found that appellant had shown no real interest in the teachings of the Bible until after he was classified 1-A and he found appellant to be insincere [Ex. 1, pp. 50-54].

On May 26, 1965, the Appeal Board sent a copy of the Department of Justice recommendation to appellant allowing him 30 days within which to reply [Ex. 1, p. 62]. On June 28, 1965, the Appeal Board received a two-page reply from appellant. In this reply appellant stated that he was a member of Jehovah's Witnesses, a group well recognized for its conscientious objection to military service. Appellant asked: "If I am recognized as an active member of this group why am I not looked upon as holding the same religious and conscientious beliefs as must <u>all</u> members before they are admitted to the group?" Appellant further stated, "The recommendation of the Department of Justice makes much of the fact that I first became active as a minister of Jehovah's Witnesses at about the same time military service appeared imminent. The implied slur is that I simply want to avoid military service for the easier or safer course of performing non-combatant work, such as some sort of clerical or hospital duties." Appellant further stated: "My claim should not be looked upon as being based on a 'sudden accession of belief' that happens to 'synchronize so perfectly with external facts' so as to be 'convenient'. Surely if, when reaching draftable age, one is considered mature enough to serve in the nation's armed forces, he also might have reached an age and point of emotional development where he could see the

need for serious religious study and participation. Hence, I vigorously repudiate the implication made by the Department of Justice!" [Ex. 1, pp. 63-64].

On September 16, 1965, the Appeal Board classified appellant 1-A [Ex. 1, pp. 11, 66]. On October 4, 1965, appellant was mailed notice of this classification [Ex. 1, p. 11]. On October 13, 1965, the Local Board received a letter from appellant indicating his desire to appeal the 1-A classification and requested that his case be presented to the President for consideration [Ex. 1, p. 67].

On December 8, 1965, the Director of Selective Service appealed to the President from appellant's 1-A classification [Ex. 1, p. 76]. On January 21, 1966, the President's Appeal Board unanimously classified appellant 1-A [Ex. 1, p. 80].

On February 18, 1966, the Local Board ordered appellant to report for induction on March 10, 1966 [Ex. 1, p. 82]. On March 10, 1966, he reported to the induction station and refused to be inducted into the armed services [Ex. 1, pp. 83-84]. Appellant gave a signed statement of his refusal [Ex. 1, p. 85]. On March 14, 1966, the Local Board received a letter from appellant in which he acknowledged his refusal to be inducted and his intention to persist in that refusal [Ex. 1, p. 97].

IV

ARGUMENT

There Was Basis In Fact For Defendant's Classification

A classification made by a Selective Service System Board is final and not subject to interference by the courts unless there is no basis in fact for the classification.

Witmer v. United States, 348 U. S. 375, 381 (1955);
Dickinson v. United States, 346 U. S. 389 (1953);
Cox v. United States, 332 U. S. 442, 448 (1947);
Estep v. United States, 327 U. S. 114, 122 (1946).

What constitutes "basis in fact" for the denial of a registrant's claim depends upon the nature of the claim. Where conscientious objection is alleged, insincerity constitutes a ground for denying a 1-O classification and a finding of insincerity can be based upon any fact which casts doubt on the veracity of the registrant.

Witmer v. United States, supra;
United States v. Corliss, 280 F. 2d 808
(2nd Cir. 1960).

Appellant claims that his 1-A classification was made without any basis in fact. Since his ultimate classification was made by the President's Appeal Board, only that classification need be considered under the rule that subsequent classifications remove prior classifications from court consideration.

Storey v. United States, 370 F. 2d 255
(9th Cir. 1966);

DeRemer v. United States, 340 F. 2d 712, 719
(8th Cir. 1965);

Tomlinson v. United States, 215 F. 2d 12
(9th Cir. 1954);

Skinner v. United States, 215 F. 2d 767, 768
(9th Cir. 1954);

Reed v. United States, 205 F. 2d 216, 218
(9th Cir. 1953);

Tyrrell v. United States, 200 F. 2d 8, 11
(9th Cir. 1952), cert. denied
345 U. S. 910 (1953).

Although classifications made by the Local Board and Appeal Board are not at issue in this case, the proceedings before those boards are significant since they constitute the record upon which the President's Appeal Board acted. This record discloses several grounds for the ultimate denial of appellant's claim for classification as a conscientious objector, including the following:

The Local Board

In his Classification Questionnaire, appellant stated: "I am a student preparing for the ministry pursuing a full time course of instruction at the Kingdom Hall of Jehovah's Witnesses under the direction of Jehovah's Witnesses" (emphasis added).[Ex. 1, p. 7]. When the Board questioned appellant he admitted that his training involved about four hours on week-ends consisting of one

hour of group study and the rest of door-to-door preaching [Ex. 1, p. 18]. This clearly established that his claim to exemption as a full time ministerial student was not genuine. Such a baseless claim entitled the Board to view his other claims for exemption with suspicion and to doubt his sincerity.

Appellant's Conscientious Objector Questionnaire contains the statement, as to the source of the belief which is the basis of his claim, that: "From childhood I was taken by my Parents to the Kindom (sic) Hall of Jehovah's Witnesses. There I learned the bible (sic) principles that formed the basis for my belief." [Ex. 1, p. 13]. However, in December, 1962, appellant told the Board that he became active in the Witnesses about a year earlier and before that time he just was not interested [Ex. 1, p. 18]. Appellant's Conscientious Objector Questionnaire was filled out by someone other than himself but he failed to disclose this person's identity as required [Ex. 1, p. 15]. This inconsistency and omission were grounds upon which the Board could reasonably doubt his sincerity.

Further basis for disbelief of appellant's professed sincerity was furnished the Board by a letter received on December 13, 1962, from appellant's presiding minister which stated that appellant "devotes many hours each week to studying the Bible over which I personally supervise" [Ex. 1, p. 17]. However, on the <u>same day</u> appellant admitted to the Board that he spent only about one hour in study each week [Ex. 1, p. 18]. That appellant procured the sending of this letter appears from his subsequent letter to the

Appeal Board [Ex. 1, p. 63]. Appellant also told the Board that he objected to being under government control [Ex. 1, p. 18], thus raising the possibility that his objection to military service was motivated by other than conscientious opposition to war. White v. United States, 215 F. 2d 782, 785 (9th Cir. 1954), cert. denied 348 U. S. 970 (1954).

In addition, the Local Board had the opportunity to judge appellant by his attitude and demeanor. This is a highly important factor as this Court pointed out in White, where it said:

> "The local board initially, and the appeal board subsequently, were called upon to evaluate a mental attitude and a belief. It is plain that when such matters are to be determined and passed upon, the attitude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as to the extent and quality of his beliefs. The local board, before whom the registrant appeared, had an opportunity surpassing that available to us or to the appeal board itself to determine and judge as to these matters." (p. 784-785).

Appellant complains that the Local Board did not ask him anything about the sincerity of his conscientious objection to war and did ask him about his affiliation with Jehovah's Witnesses (Appellant's Opening Brief, pp. 6-7). Allegations of error by the

Local Board are not matters for consideration by this Court in view of appellant's subsequent classification. However, it should be pointed out that the Board questioned appellant about his participation in Jehovah's Witnesses activities in order to determine the facts about his claim to be a full time ministerial student. The Board also questioned him concerning his belief in the use of force, and gave him opportunity to make any further statement about his sincerity, which he chose not to do [Ex. 1, pp. 18-19]. Since appellant has the burden of establishing his eligibility for deferment to the satisfaction of the Board, he cannot complain of the Board's failure to ask questions. Tyrrell v. United States, 200 F. 2d 8 (9th Cir. 1952), cert. denied 345 U. S. 910 (1953).

Appellant's complaint that the board should not have judged him as a member of a group but as an individual because members of Jehovah's Witnesses are free to serve in the armed forces or not as they choose (Appellant's Opening Brief, pp. 6-7) merely points up another instance in which appellant changes his story when it is convenient. In his Conscientious Objector Questionnaire, appellant said "One's participation or non-participation in war is left for the individual member to decide" [Ex. 1, p. 14]. Appellant later wrote the Appeal Board and asked: "If I am recognized as an active member of this group why am I not looked upon as holding the same religious and conscientious beliefs as must all members before they are admitted to the group?" [Ex. 1, p. 63]. It appears that when appellant was not active in his religious group he asked to be judged as an individual, and after he became active he asked to be

judged as a member of the group.

The Appeal Board

After appellant appealed from his classification of 1-A by the Local Board, the Department of Justice made an inquiry into the matter [Ex. 1, p. 33]. The resume of this inquiry reflects that the congregational servant of Jehovah's Witnesses stated that appellant had performed five hours of "ministry work" in December, 1962, and eighteen hours in January, 1963, the month after he was classified 1-A [Ex. 1, p. 37].

In addition to the inquiry, appellant was given a hearing before a Hearing Officer [Ex. 1, p. 50]. At that time, he stated that he was baptized a Jehovah's Witness on May 3, 1963, and is opposed to military service and civilian work of national interest as well. The Hearing Officer noted that appellant was inactive in congregational work prior to his 1-A classification by the Local Board, and that appellant did not begin any intensive study of the Bible until about January, 1963. Appellant told the Hearing Officer that it was a mere coincidence that his study of the Bible began after his 1-A classification on December 13, 1962. The Hearing Officer found that although appellant had fair knowledge of the Bible at the time of the hearing on January 18, 1965, he had shown no real interest in its teachings until after he was classified 1-A. The Hearing Officer found appellant to be not sincere, either in his beliefs or in his intentions [Ex. 1, p. 52].

Appellant's claim that the Hearing Officer's statements and findings must be in error because they conflict with statements

made at appellant's meeting with the Local Board (Appellant's Opening Brief, p. 8) is ludicrous in view of the fact that it was appellant who made both statements. The explanation is not that the Hearing Officer erred, but that appellant told the Local Board one thing and the Hearing Officer another. This conclusion is bolstered by the fact that both the resume of the Department of Justice inquiry and the Hearing Officer's findings were sent to appellant for any reply he wished to make [Ex. 1, pp. 40, 62]. Appellant wrote lengthy replies, but never contested any of the matters of which he now complains [Ex. 1, pp. 41-42, 63-64]. In fact, appellant's replies claimed that his simultaneous draft eligibility and interest in Bible study "was only coincidental" [Ex. 1, p. 41], and stated that "the recommendation of the Department of Justice makes much of <u>the fact</u> that I first became active as a minister of Jehovah's Witnesses at about the same time military service appeared imminent" (emphasis added) [Ex. 1, p. 63].

The President's Appeal Board

Appellant seems to imply that the Selective Service Boards did not succeed in proving that he does not hold the belief claimed (Appellant's Opening Brief, p. 5). However, a conscientious objector claim admits of no exact proof, and no board could ever prove that a registrant does not have such a belief. The ultimate question is appellant's sincerity. The subjective determination of the President's Appeal Board on this question is amply supported by the objective evidence which casts doubt on appellant's veracity. This evidence includes the following:

(1) The appellant's spurious claim for a ministerial student deferment;

(2) his conflicting allegations as to the time his religious beliefs were formed;

(3) the inconsistent statements regarding the extent of his involvement in church activity;

(4) his objection to being under any governmental control;

(5) the coincidence of his simultaneous interest in religious study and the imminence of induction, and

(6) the evaluation of appellant's credibility and demeanor by the Local Board and the Hearing Officer, both of whom had the best opportunity to evaluate his claim, and both of whom found him to be insincere.

Founded upon the above mentioned items in the record the classification of the President's Appeal Board had more than ample basis in fact.

Appellant attempts to gloss over some of the inconsistencies in his statements by references to trial testimony (Appellant's Opening Brief, p. 9). This is improper, since evidence of "basis in fact" is limited to that which was before the board.

Cox v. United States, 332 U.S. 442 (1947);
Davis v. United States, 203 F.2d 853
(8th Cir. 1953).

V

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ David R. Nissen
DAVID R. NISSEN